

Staff Summary Report



Council Meeting Date: 12/06/07

Agenda Item Number: 59

SUBJECT: Request award of a construction contract to PCL Construction, Inc.; approval of a professional services contract with Ricker Atkinson McBee and Morman; and approval of a construction change order allowance for The Pier at Town Lake, Improvement District No. 180.

DOCUMENT NAME: 20071206PWDR02 IMPROVEMENT (ASSESSMENT) DISTRICTS (0805-80), IMPROVEMENT DISTRICT NO. 180, PROJECT NO. 5103011

SUPPORTING DOCS: Yes

COMMENTS: Construction contract with PCL Construction, Inc. in the amount of \$17,263,548.95; materials testing services contract with Ricker Atkinson McBee and Morman in an amount not to exceed \$60,000; and a construction change order allowance in the amount of \$300,000. All subject to execution of the final written contract/addenda.

There was an irregularity in the bid of PCL Construction, Inc. in that a unit cost and total cost for one of the bid items (Item No. 129) was omitted in their proposal. City staff contacted PCL Construction, Inc. regarding the irregularity and received direction in writing from them to add \$0.00 as the unit cost and total cost of that bid item. This is a waivable item by City Council and is a benefit to the Improvement District, therefore, staff recommends award of the construction contract to PCL Construction, Inc. with the unit cost and total cost of Bid Item No. 129 as \$0.00.

PREPARED BY: JIM BOND, ASSISTANT CITY ENGINEER (x8897)

REVIEWED BY: ANDY GOH, DEPUTY PW MANAGER/CITY ENGINEER (x8896)

LEGAL REVIEW AS TO FORM: CYNTHIA McCOY, ASSISTANT CITY ATTORNEY (x2187)

FISCAL NOTE: Funding for construction of this Improvement District (I.D.) and all associated costs will be completed through the issuance of I.D. bonds, whose debt service costs are paid through assessments on private properties within the Improvement District.

RECOMMENDATION: Award construction contract, change order allowance, and professional services contract.

ADDITIONAL INFO: The scope of work consists of construction of water, sewer, paving, curbs, gutters, sidewalks, driveways, storm drain facilities, landscaping improvements, streetlights, traffic signals and public utility improvements.

On November 20, 2007, the following bids were received:

<u>Contractor</u>	<u>Total Bid</u>
PCL Construction, Inc.	\$17,263,548.95
FNF Construction, Inc.	\$17,551,271.52
Archer Western	\$17,747,723.90
Nesbitt Contracting	\$17,875,970.50
Haydon Building	\$18,630,713.15

The bid of PCL Construction, Inc. has been reviewed by staff and found to be in order.

The construction contract award is conditioned upon execution of final written contract documents and approved submittals of any required payment bond, performance bond, ensure to insure affidavit, insurance certificates or other documents.

The professional service contract with Ricker Atkinson McBee and Morman was negotiated by staff and the fee is considered reasonable for the scope of services. This contract approval is conditioned upon execution of final written contract documents and approved submittals of any required ensure to insure affidavit, insurance certificates or other documents.

Approved by Glenn Kephart, Public Works Manager

CONTRACT

COPY

THIS CONTRACT, made and entered into this 6th day of December, 2007, by and between PCL Construction, Inc. (the "Contractor"), and Glenn Kephart, Superintendent of Streets by and on behalf of the City of Tempe (the "Superintendent of Streets"), acting under the provisions of Arizona Revised Statutes §§ 48-571 through 48-619, inclusive, and all amendments and supplements thereto.

WITNESSETH THAT WHEREAS, the Contractor, as will appear by reference to the minutes of the proceedings of the Mayor and Council of the City, was duly awarded the work for the improvement to be constructed in accordance with Resolution No. 2007.78 (the "Resolution of Intention") of the City of Tempe, Arizona.

NOW, THEREFORE, the parties agree as follows: Contractor, with the intent to be bound by and in accordance with the terms of the proposal, the Resolution of Intention, Specifications and Contract Documents, Addendum, Plans and Specifications, Performance Bond, Payment Bond and Certificate of Insurance and Change Orders, if any (collectively, the "Contract Documents"), which by this reference are incorporated into and made a part of this contract, for the consideration hereinafter mentioned, promises and agrees that it will do and perform or cause to be done and performed, in good and workmanlike manner, under the direction and to the satisfaction of the City Engineer and the Superintendent of Streets, all the work described in the Contract Documents including the Add Alternates awarded as part of the contract.

The Contractor shall furnish any and all plant, materials, labor, construction equipment, services and transportation (all applicable taxes included) required for performing all work for the installation of the

**PIER AT TOWN LAKE
IMPROVEMENT DISTRICT NO. 180
PROJECT NO. 5103011**

for the sum of Seventeen Million, Two Hundred Sixty Three Thousand Five Hundred Forty Eight and 95/100 Dollars (\$17,263,548.95) (Base Bid), and to construct the same and install the material therein for the Owner, in a good and workmanlike and substantial manner and to the satisfaction of the Owner or his properly authorized agents and strictly pursuant to and in conformity with the Specifications and Plans for the above referenced project(s) and other documents that may be made by the Owner through the Engineer or his properly authorized agents, as provided herein.

The Contractor further agrees that it will do or perform the said work according to the Contract Documents, and that it will, at its own cost and expense, furnish all the necessary materials and labor for said work and that the materials used therein shall comply with the said specifications to the satisfaction of the City Engineer and the Superintendent of Streets; and that it will, within the time hereinafter fixed, turn said work over to the Superintendent of Streets, complete and ready for use free and discharged of all claims and demands whatsoever, for or on account of all labor and materials used or furnished to be used in said improvement.

The Contractor agrees to perform the work fully and in all things execute and complete this contract within the time set forth above, and should the Contractor fail to complete the work within the time agreed upon, the Contractor agrees to pay and will pay to the City, for each and every day of such delay beyond the time of completion of all the work as set forth above, a sum per day equal to the daily interest charge accruing on the total principal amount of the improvement bonds sold to the costs of the work, which sum is hereby, in view of the difficulty of estimating such damages, agreed upon as the liquidated damages that the City will suffer by such delay and not by way of forfeiture or penalty. The Contractor shall be responsible under this contract for delays caused by subcontractors, materialmen or suppliers.

The Superintendent of Streets, in his official capacity as such Superintendent of Streets and not individually, hereby fixes the time for commencement of said work no later than ten (10) calendar days after the date the City has received payment for the City of Tempe Pier at Town Lake Improvement District No. 180 Improvement Bonds, as evidenced by a statement to such effect being delivered to the Superintendent of Streets, and for its completion to be within 270 consecutive calendar days from such date.

IT IS EXPRESSLY UNDERSTOOD AND AGREED by the parties to this agreement, that in no case (except where it is otherwise provided for in Arizona Revised Statutes, §§ 48-571 to 48-619 inclusive) will the City or any officer thereof, be liable for any portion of the expenses of the work aforesaid, nor for any delinquency by persons owning property assessed, nor for the failure of the City to sell its improvement bonds to finance this contract.

The consideration for the Contractor's promises and agreements herein set forth shall be as follows:

Upon the sale of the bonds, the proceeds therefrom, together with the proceeds from any cash collections, shall be deposited in a special fund to be held by the Finance Services Manager and to be used for payment of incidental expenses and payments to the Contractor. From such proceeds, the City shall make monthly payments to the Contractor upon a basis of ninety percent (90%) of the value of the work actually performed as estimated by the City Engineer to and including the last day of the preceding calendar month. The balance due the Contractor shall be paid after the governing body has approved the assessment after the hearing thereon. Pending use of the bond proceeds, the Finance Director may invest the proceeds in any investments for which sinking funds of this state may be invested.

The contractor shall abide by all of the laws of the State of Arizona and resolutions and ordinances of the City while performing this contract.

This contract shall become effective and binding only upon the sale of the City's Improvement District Bonds (the "Bonds") in an amount sufficient, when added to cash payments, to finance the payments due the Contractor and pay incidental expenses and the obtaining by the City by title, easement or immediate possession all land required for completion of the Work. The City reserves the right to rescind this contract or modify the contract by reducing the scope of some or all of the work without liability of any kind if it is unable to provide funding or to acquire the necessary land rights-of-way. If rescission occurs, neither party shall be liable to the other for any amount whatsoever. In the event the Mayor and Council uphold an objection to the award of construction contract which requires either abandonment of

the project or rescission of the award of contract, this contract shall be deemed fully and completely rescinded and neither party shall be liable to the other for any amount whatsoever due to such rescission.

If the City has not received the proceeds of the Bonds within 120 days from the date hereof, this contract may be rescinded by written notice executed by the Contractor and delivered to the Superintendent of Streets of the City, with no liability for monetary damages being chargeable against either party, such rescission to become effective no earlier than the date such notice is delivered to the Superintendent of Streets.

If, because of pending or threatened litigation concerning any one or more parcels subject to assessment which will secure payment of bonds either issued or to be issued to finance this contract, and the City and the winning bidder receive a written opinion of Gust Rosenfeld P.L.C., Bond Counsel to the City, stating that bonds cannot be issued against such parcel or parcels, the City, without liability of any kind, may then cause this construction contract to be modified to exclude herefrom some or all of the Work which will benefit the parcel or parcels in question. The filing of a certificate and request that no bonds be issued against any parcel pursuant to § 48-597, Arizona Revised Statutes, may be deemed by the City to be threatened litigation.

Pursuant to A.R.S. § 38-511, the City of Goodyear may cancel this contract, without penalty or further obligation, if any person significantly involved in initiating, negotiation, securing, drafting or creating the contract on behalf of the City of Tempe is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract. In the event of the foregoing, the City of Goodyear may recoup any fee or commission paid or due to any person significantly involved in initiating, negotiation, securing, drafting or creating this contract on behalf of the City of Tempe from any other party to the contract, arising as a result of this contract.

The Contractor, with regard to the work performed by it after award and during its performance of this contract, will not discriminate on the grounds of race, color, national origin, religion, sex, disability or familial status in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Contractor will not participate either directly or indirectly in the discrimination prohibited by or pursuant to Title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act of 1973, § 109 of the Housing and Community Development Act of 1974, the Age Discrimination Act of 1975 and Executive Order 11246, as amended.

The Contractor hereby agrees to indemnify and hold harmless the City, its departments and divisions, its employees and agents, from any and all claims, liabilities, expenses or lawsuits as a result of the undersigned's participation as set forth herein, whether said claims, liabilities, expenses or lawsuits arise by the acts or omissions of the Contractor or his/her agents or employees, or whether by the acts or omissions of the Contractor's subcontractors, agents or employees.

It is expressly agreed and understood by and between the parties that the Contractor is being retained by the City as an independent contractor, and as such the Contractor shall not become a City employee, and is not entitled to payment or compensation from the City or to any

fringe benefits to which other City employees are entitled other than that compensation as set forth above. As an independent contractor, the Contractor further acknowledges that he is solely responsible for payment of any and all income taxes, FICA, withholding, unemployment insurance, or other taxes due and owing any governmental entity whatsoever as a result of this Agreement. As an independent contractor, the Contractor further agrees that he will conduct himself in a manner consistent with such status, and that he will neither hold himself out nor claim to be an officer or employee of the City by reason thereof, and that he will not make any claim, demand or application to or for any right or privilege applicable to any officer or employee of the City, including but not limited to workmen's compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit.

Prior to final payment to the Contractor, the City shall deduct therefrom any and all unpaid privilege, license and other taxes, fees and any and all other unpaid monies due the City from the Contractor, and shall apply those monies to the appropriate account. The Contractor shall provide to the City any information necessary to determine the total amount(s) due.

For each and every day the Work contemplated by the construction contract remains uncompleted beyond the time set for its completion, or as the time for completion of the Work may be extended by the City Engineer with the consent of the mayor and common council of the City, the Contractor shall pay to the City an amount per calendar day equal to the per diem interest cost on the hereinabove described improvement bonds from the date scheduled for completion of the Work to the date of actual completion of the Work plus an amount equal to all direct "out-of-pocket expenses" (but not consequential expenses) incurred by the City as a result of the Contractor's failure to complete the Work by the time set for its completion as liquidated damages and not as a forfeit or penalty. **Direct expenses are defined as expenses required to enforce performance of the contract and collection under the bond.** This sum may be deducted from monies due or to become due to the Contractor as compensation under the construction contract.

Contract - continued

IN WITNESS WHEREOF, this Contract has been duly executed by the parties hereinabove named, on the date and year first herein written.

CITY OF TEMPE
a Municipal Corporation

Name

Title

Recommended by:

Andy
Deputy PW Manager/City Engineer

ATTEST:

Authorized Officer

Official Title

APPROVED AS TO FORM:

City Attorney

(Corporate Seal)

The contractor warrants that the person who is signing this Agreement on behalf of the contractor is authorized to do so and to execute all other documents necessary to carry out the terms of this Agreement.

CONTRACTOR:

Party of the Second Part

Name

Title

City of Tempe Transaction Privilege
License (Sales Tax) Permit No.

(Corporate Seal)

Certified to be a true and exact copy

Karen M. Fillmore, Records Specialist

Witness: If Contractor is an Individual



CITY OF TEMPE, ARIZONA
PUBLIC WORKS DEPARTMENT
DIVISION OF ENGINEERING

CONTRACT FOR PROFESSIONAL SERVICES (OTHER)

THIS CONTRACT is made and entered into on the 6th day of December, 2007, by and between the City of Tempe, hereinafter called CITY, and RICKER ATKINSON MCBEE MORMAN AND ASSOCIATES, INC., hereinafter called the CONSULTANT.

The CITY engages the CONSULTANT to perform professional services for a project known and described as THE PIER AT TEMPE TOWN LAKE IMPROVEMENT DISTRICT NO. 180, Project No. 5103011, hereinafter called the "Project".

SECTION I - SERVICES OF THE CONSULTANT

The CONSULTANT shall perform the following professional services to CITY standards and in accordance with the degree of care and skill that a registered professional in Arizona would exercise under similar conditions:

- A. The CONSULTANT shall provide materials testing and inspection, as described in Exhibit "A" attached.
- B. The CONSULTANT has assigned Shawn Morman as the Project Manager for this Contract. Prior written approval is required in the event the CONSULTANT needs to change the Project Manager. The CONSULTANT shall submit the qualifications of the proposed substituted personnel to the City for approval.

SECTION II - PERIOD OF SERVICE

The CONSULTANT shall complete all services within 300 calendar days of the "Notice to Proceed" date. In the event delays are experienced beyond the control of the CONSULTANT, the schedule may be revised as mutually agreed upon by the CITY and the CONSULTANT.

SECTION III - CONSULTANT'S COMPENSATION

- A. The method of payment for this CONTRACT is payment by installments. Total compensation for the services performed shall not exceed \$60,000.00, unless otherwise authorized by the CITY.
- B. The CITY shall pay the CONSULTANT installments based upon monthly progress reports and detailed invoices submitted by the CONSULTANT. Such payments to be made to the CONSULTANT within thirty (30) days after receipt of the progress report and detailed invoice.

SECTION IV - THE CITY'S RESPONSIBILITIES

- A. The CITY shall designate a project manager during the term of this CONTRACT. The project manager has the authority to administer this CONTRACT and shall monitor compliance with all terms and conditions stated herein. All requests for information from or a decision by the CITY on any aspect of the work shall be directed to the project manager.
- B. The CITY shall review submittals by the CONSULTANT and provide prompt response to questions and rendering of decisions pertaining thereto, to minimize delay in the progress of the CONSULTANT'S work. The CITY will keep the CONSULTANT advised concerning the progress of the CITY'S review of the work. The CONSULTANT agrees that the CITY'S inspection, review, acceptance or approval of CONSULTANT'S work shall not relieve CONSULTANT'S responsibility for errors or omissions of the CONSULTANT or it's sub-consultant(s).
- C. Unless included in the CONSULTANT'S Services as identified in Section I, the CITY shall furnish the CONSULTANT gratis, the following information or services for this Project:
 - 1. One copy of its maps, records, laboratory tests, survey ties, and benchmarks, or other data pertinent to the services. However, the CONSULTANT shall be responsible for searching the records and requesting specific drawings or information and independently verifying said information.
 - 2. Available City data relative to policies, regulations, standards, criteria, studies, etc., relevant to the Project.
 - 3. When required, title searches, legal descriptions, detailed ALTA Surveys, and environmental assessments to the end that the CITY may proceed with the right of way acquisition.

SECTION V - TERMINATION

The CITY, at its sole discretion, may terminate this CONTRACT for convenience or abandon any portion of the Project for which services have not been performed by the CONSULTANT, upon fourteen (14) days written notice delivered to CONSULTANT personally or by certified mail at 2105 S. Hardy Drive, Suite 13, Tempe, AZ 85282. This CONTRACT may be terminated pursuant to ARS Sec. 38-511.

Immediately after receiving such notice, the CONSULTANT shall discontinue advancing the services under this CONTRACT and proceed to close said operations under this CONTRACT. The CONSULTANT shall appraise the services it has completed and submit an appraisal to the CITY for evaluation. The CITY shall have the right to inspect the CONSULTANT'S work to appraise the services completed.

The CONSULTANT shall deliver to the CITY all drawings, special provisions, field survey notes, reports, estimates and any and all other documents or work product generated by the CONSULTANT under the CONTRACT, entirely or partially completed, together with all unused materials supplied by the CITY.

In the event of such termination or abandonment, the CONSULTANT shall be paid for services performed prior to receipt of said notice of termination including reimbursable expenses then incurred.

If the remuneration scheduled hereunder is based upon a fixed fee or definitely ascertainable sum, the portion of such sum payable shall be proportionate to the percentage of services completed by the CONSULTANT based upon the scope of work set forth in Exhibit A, and shall be agreed upon mutually by the CONSULTANT and the CITY. However, in no event shall the fee exceed that set forth in Section III of the attached CONTRACT.

The CITY shall make final payment within sixty (60) days after the CONSULTANT has delivered the last of the partially completed items and the final fee has been agreed upon.

In the event this CONTRACT is terminated, the CITY shall have the option of completing the work, or entering into a CONTRACT with another party for the completion of the work according to the provisions and agreements herein.

SECTION VI - SUPPLEMENTAL CONTRACT PROVISIONS

The supplemental contract provisions to this CONTRACT are attached hereto and incorporated herein by reference as if fully set forth.

The Pier at Tempe Town Lake Improvement District No. 180
Project No. 5103011

IN WITNESS WHEREOF, the parties hereto have executed this CONTRACT this _____ day
of _____, 2007.

CITY OF TEMPE, ARIZONA

By _____
Mayor

By _____
Public Works Manager

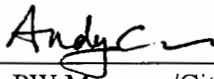
ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

Recommended By:



Deputy PW Manager/City Engineer

The CONSULTANT warrants that the person who is signing this CONTRACT on behalf of the CONSULTANT is authorized to do so and to execute all other documents necessary to carry out the terms of this CONTRACT.

CONSULTANT
Ricker Atkinson McBee Morman and Associates, Inc.

Name

Title

Federal I.D. No. /Social Security No.

Certified to be a true and exact copy.

Karen M. Fillmore
Records Specialist

**CITY OF TEMPE
TEMPE, ARIZONA
DEPARTMENT OF PUBLIC WORKS**

**AFFIDAVIT OF GENERAL CONTRACTOR / PRIME CONSULTANT
REGARDING
HEALTH INSURANCE**

_____,
Arizona

Date _____

**The Pier at Tempe Town Lake Improvement District No. 180
Project No. 5103011**

I hereby certify that _____ (name of company) currently has, and all of its major subcontractors/subconsultants, defined as doing work in excess of \$30,000.00, will have, during the course of this contract, health insurance for all employees working on this project and will offer health insurance coverage to eligible dependents of such employees, as defined in the accompanying Guidelines. The company's health insurance is as follows:

Name of Insurance Company: _____

Type of Insurance (PPO, HMO, POS, INDEMNITY): _____

Policy No.: _____

Policy Effective Date (MM/DD/YY): _____

Policy Expiration Date (MM/DD/YY): _____

Signed and dated at _____, this _____ day of _____, 2007.

General Contractor/Prime Consultant

By: _____

STATE OF ARIZONA)
) ss
COUNTY OF MARICOPA)

SUBSCRIBED AND SWORN to before me this _____ day of _____, 2007.

Notary Public

My commission expires:

City of Tempe

Guidelines for Implementation of Health Insurance

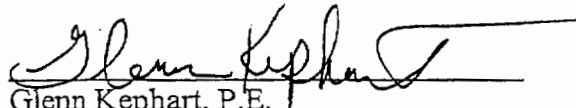
These Guidelines are provided for purposes of implementing Resolution No. 2000.73, which requires all employees of prime consultants, general contractors and major subconsultants and subcontractors to have health insurance and to offer health insurance to their eligible dependants, as determined at the start of each project. Questions regarding these guidelines should be directed to the City of Tempe Engineering Division at (480) 350-8200.

1. All Prime Consultants who enter into a Public Works contract or General Contractors who bid on Public Works projects that are advertised for bid and enter into a contract in excess of \$30,000 with the City of Tempe after January 1, 2001, are required to sign an affidavit in the form attached hereto. The prime consultant or general contractor shall require that all major subconsultants or subcontractors, defined as entities doing work in excess of \$30,000, comply with the health insurance requirements. In signing the affidavit, prime consultants and general contractors may refer to and rely upon these Guidelines for interpretation.
2. Health insurance is required for permanent employees who work for the consultant/contractor more than one hundred and twenty (120) days in any calendar year. A "work day" consists of any time within a twenty-four hour period, regardless of number of hours, that the individual is paid. This requirement excludes students working part-time who are enrolled in a recognized educational institution. Many companies have a grace period or a qualifying period prior to commencement of insurance coverage, which is acceptable so long as the employee coverage begins by the 120th day of contract signing. Temporary employees will be covered to the same extent as the City of Tempe covers temporary employees as determined at the start of each project.
3. If a contractor is a "Union" shop and withholds union dues from employees for health insurance coverage that is also offered to their eligible dependents and meets all City requirements, the Contractor may so note on the required affidavit.
4. The health insurance requirements herein apply to all employees that are directly involved with the City of Tempe project including support and administrative personnel.
5. Health insurance coverage must be maintained during the entire time of the contract, including any warranty periods, with the City.
6. All complaints concerning violations of the health insurance requirements shall be filed by an employee, in writing, with the Public Works Department, within thirty (30) days from discovery of the violation. An administrative hearing will be held before the Public Works Manager, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal from the decision

of the Public Works Manager may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Public Works Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.

7. In the event of a finding by the City of a violation of the insurance provisions, the company in violation of the provision shall be barred from bidding on, or entering into, any public works contract with the City for a minimum period of three (3) years.
8. All consultants and contractors subject to the health insurance requirements shall post, in English and Spanish, notice of the health insurance requirements at their office and at the job site. Signs for posting will be provided by the City.

These "Guidelines for Implementation of Health Insurance", issued and dated this 21st day of August, 2002, hereby amend all guidelines previously issued.


Glenn Kephart, P.E.
Public Works Manager

CITY OF TEMPE, ARIZONA
PUBLIC WORKS DEPARTMENT
DIVISION OF ENGINEERING

SUPPLEMENTAL CONTRACT PROVISIONS

SECTION I - INSURANCE

Without limiting any of their obligations or liabilities, the CONSULTANT, at its own expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona, Department of Insurance, and with forms reasonably satisfactory to the CITY. Each insurer shall have a current A.M. Best Company, Inc. rating of not less than A-VII. Use of alternative insurers requires prior approval from the CITY.

A. General Clauses

1. **Additional Insured.** The insurance coverage, except Workers' Compensation and Professional Liability, required by this CONTRACT, shall name the CITY, its agents, representatives, directors, officials, and employees, as additional insured, and shall specify that insurance afforded the CONSULTANT shall be primary insurance, and that any self insured retention and/or insurance coverage carried by the CITY or its employees shall be excess coverage, and not contributory coverage to that provided by the CONSULTANT.
2. **Coverage Term.** All insurance required herein shall be maintained in full force and effect until Services required to be performed under the terms of this CONTRACT are satisfactorily completed and formally accepted; failure to do so may constitute a material breach of this CONTRACT, at the sole discretion of the CITY.
3. **Primary Coverage.** The CONSULTANT's insurance shall be primary insurance as respects the CITY and any insurance or self insurance maintained by the CITY shall be in excess of the CONSULTANT'S insurance and shall not contribute to it.
4. **Claim Reporting.** CONSULTANT shall not fail to comply with the claim reporting provisions of the policies or cause any breach of a policy warranty that would affect coverage afforded under the policy to protect the CITY.
5. **Waiver.** The policies for Workers' Compensation and General Liability shall contain a waiver of transfer rights of recovery (subrogation) against the CITY, its agents, representatives, directors, officers, and employees for any claims arising out of the work of the CONSULTANT.

6. **Deductible/Retention.** The policies may provide coverage, which contains deductibles or self-insured retentions. Such deductible or self-insured retentions shall not be applicable with respect to the coverage provided to the CITY under such policies. The CONSULTANT shall be solely responsible for deductible or self-insured retentions and the CITY may require the CONSULTANT to secure the payment of such deductible or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit.
7. **Policies and Endorsements.** The CITY reserves the right to request and to receive, within 10 working days, information on any or all of the above policies or endorsements.
8. **Certificates of Insurance.** Prior to commencing services under this CONTRACT, CONSULTANT shall furnish the CITY with Certificates of Insurance, or formal endorsements as required by the CONTRACT, issued by CONSULTANT'S insurer(s), as evidence that policies providing the required coverages, conditions, and limits required by this CONTRACT are in full force and effect. Such certificates shall identify this CONTRACT by referencing the project number and/or project name and shall provide for not less than thirty (30) days advance written notice by Certified Mail of cancellation or termination of insurance.
9. **Sub-Consultants/Contractors.** CONSULTANT shall include all sub-consultants and sub-contractors as insured under its policies or shall furnish separate certificates and endorsements for each sub-consultant and sub-contractor.

B. Workers' Compensation

The CONSULTANT shall carry Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of CONSULTANT employees engaged in the performance of the Services; and Employer's Liability insurance of not less than \$100,000 for each accident, \$100,000 disease for each employee, and \$500,000 disease policy limit.

In case Services are sub-contracted, the CONSULTANT shall require the sub-consultant to provide Workers' Compensation and Employer's Liability to at least the same extent as provided by the CONSULTANT.

C. Automobile Liability

The CONSULTANT shall carry Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damages of not less than \$1,000,000 each occurrence regarding any owned, hired, and non-owned vehicles assigned to or used in performance of the CONSULTANT Services. Coverage will be at least as broad as coverage Code 1 "any auto" (Insurance Service Office policy form CA 0001 1/87 or any replacements thereof). Such coverage shall include coverage for loading and unloading hazards.

D. Commercial General Liability

The CONSULTANT shall carry Commercial General Liability insurance with a combined single limit of not less than \$1,000,000. The policy shall be primary and include coverage for bodily injury, property damage, personal injury, products, completed operations, and blanket contractual covering, but not limited to, the liability assumed under the indemnification provisions of this CONTRACT, which coverage will be at least as broad as Insurance Service Office policy form CG 0002 1-11-88 or any replacement thereof.

In the event the general liability insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the Services as evidenced by annual Certificates of Insurance.

Such policy shall contain a "severability of interests" provision (also known as "cross liability" and "separation of insured").

E. Professional Liability

The CONSULTANT retained by the CITY to provide the engineering services required by the CONTRACT will maintain Professional Liability insurance covering errors and omissions arising out of the Services performed by the CONSULTANT or any person employed by him, with an unimpaired limit of not less than \$1,000,000 each claim and \$1,000,000 all claims, or 10% of the construction budget, whichever is larger. In the event the insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of Services as evidenced by annual Certificates of Insurance.

F. Property Coverage – Valuable Papers

The CONSULTANT shall carry Property coverage on all-risk, replacement cost, agreed amount form with Valuable Papers insurance sufficient to assure the restoration of any documents, memoranda, reports, or other similar data relating to the services of the CONSULTANT used in the completion of this CONTRACT.

HEALTH INSURANCE REQUIREMENTS

All Consultants who enter into a Public Works contract in excess of \$30,000.00 with the City of Tempe, after January 1, 2001, must certify that they have, and all of their major sub-consultants will have, health insurance for all employees. Health insurance must be offered to eligible dependents of all such employees. An affidavit must be signed in the form included herein (Page AFF-1). Major sub-consultants are defined as entities doing work in excess of \$30,000.00 as determined at the start of each project. All required health insurance must be maintained during the entire time of the contract with the City.

Health insurance is required for all consultant and major sub-consultant employees who work more than one hundred and twenty (120) days in any calendar year. A "work day" consists of any time within a twenty-four hour period, regardless of number of hours, that the individual is paid. At this time, health insurance is not required for temporary employees or students working part-time who are enrolled in a recognized educational institution.

The health insurance requirements shall apply to all employees directly involved with this City project including support and administrative personnel.

All complaints concerning violations of the health insurance requirements shall be filed, in writing, with the Public Works Department, within thirty (30) days from discovery of the violation. An administrative hearing will be held before the Public Works Manager, and a written decision of findings will be provided to the parties to the hearing within ten (10) days thereafter. Appeal from the decision of the Public Works Manager may be made within ten (10) days of the date of the decision by filing a notice of appeal in writing with the Public Works Department. If an appeal is timely filed, an administrative hearing will be held before an administrative hearing officer appointed by the City Manager. The decision of the administrative hearing officer shall be final.

In the event of a finding of violation of the insurance provisions, the company in violation of the provision shall be barred from bidding on, or entering into, any Public Works contract with the City for a period of three (3) years from the execution of the contract.

All Consultants subject to the health insurance requirements shall post, in English and Spanish, notice of the health insurance requirements at their office and at the job site. Signs for posting will be provided by the City at the Pre-construction Conference for Contractors and sent with the executed contract for Consultants.

SECTION II - OWNERSHIP OF DOCUMENTS

All work products (electronically or manually generated) including but not limited to plans, specifications, cost estimates, tracings, studies, design analyses, original mylar drawings, computer aided drafting and design (CADD) file diskettes which reflect all final drawings, and other related products which are prepared in the performance of this CONTRACT are the property of the CITY and are to be delivered to the CITY before the final payment is made to the CONSULTANT.

The CITY shall retain ownership of these original drawings, however, if approved in writing by the CITY, the CONSULTANT may retain the original drawings and supply the CITY with reproducible mylar copies. CONSULTANT shall endorse by his/her professional seal all plans and special provisions furnished by him/her.

In the event these documents are used for another project without further consultations with the CONSULTANT, the CITY agrees to indemnify and hold the CONSULTANT harmless from any claim arising from the reuse of the documents. The CITY shall remove the CONSULTANT'S seal and title block from such documents.

The CONSULTANT shall retain full copyrights of all documents produced by the CONSULTANT on behalf of City in connection with the Services of this CONTRACT, with exception of CITY rights to use drawings for reproduction and promotional purposes.

SECTION III - CONFLICT OF INTEREST

The CONSULTANT agrees to promptly disclose any financial or economic interest in the Project property, or any property affected by the Project, existing prior to the execution of this CONTRACT. Further, the CONSULTANT agrees to promptly disclose any financial or economic interest with the Project property, or any property affected by the Project, if the CONSULTANT gains such interest during the course of this CONTRACT.

If the CONSULTANT gains any financial or economic interest in the Project during the course of this CONTRACT, this may be grounds for terminating this CONTRACT at the sole discretion of the CITY.

The CONSULTANT shall not engage the services on this CONTRACT of any present or former CITY employee who was involved as a decision maker in the selection or approval processes, or who negotiated or approved billings or contract modifications for this CONTRACT.

The CONSULTANT agrees that it shall not perform services on this Project for the contractor, sub-contractor, or any supplier.

The CONSULTANT shall not negotiate, contract, or make any agreement with the contractor, sub-contractor, or any supplier with regard to any of the work under this Project, or any services, equipment or facilities to be used on this Project.

SECTION IV - COVENANT AGAINST CONTINGENT FEES

The CONSULTANT affirms that he has not employed or retained any company or person, other than a bona fide employee working for the CONSULTANT to solicit or secure this CONTRACT, and that he has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of the CONTRACT. For breach or violation of this clause, the CITY may terminate this CONTRACT without liability, or in its discretion may deduct from the Contract price or consideration, or otherwise recover, the full amount of such fee, commission, percentage brokerage fee, gift, or contingent fee.

SECTION V - INDEMNIFICATION

To the fullest extent permitted by law, the CONSULTANT shall defend, indemnify and hold harmless the CITY, its agents, officers, officials, and employees from and against all claims, damages, losses, and expenses (including but not limited to attorney's fees, court costs, and the costs of appellate proceedings), relating to, arising out of, or alleged to have resulted from the negligent acts, errors, mistakes or omissions in the work, services, or professional services of the CONSULTANT, its agents, employees, or any other person (not the CITY) for whose negligent acts, errors, mistakes or omissions in the work, services, or professional services the CONSULTANT may be legally liable in the performance of this contract. CONSULTANT'S duty to defend, hold harmless and indemnify the CITY, its agents, officers, officials, and employees shall arise in connection with any claim for damage, loss, or expenses that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of any person or property, including loss of use resulting therefrom, caused by any negligent acts, errors, mistakes, omissions, work, services, or professional services in the performance of this contract by CONSULTANT or any employee of the CONSULTANT, or any other person (not the CITY) for whose negligent acts, errors, mistakes, omissions, work, or services the CONSULTANT may be legally liable. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.

SECTION VI - DISPUTE RESOLUTION

In the event of a dispute concerning questions of fact that arise during the course of the CONTRACT, the parties will meet in good faith to attempt to resolve such questions.

SECTION VII - ADDITIONAL SERVICES

Additional services which are outside the scope of basic services contained in this CONTRACT shall not be performed by the CONSULTANT without prior written authorization from the CITY. Additional services, when authorized by an executed contract or an Amendment to this CONTRACT shall be compensated for by a fee mutually agreed upon between the CITY and the CONSULTANT.

SECTION VIII - SUCCESSORS AND ASSIGNS

This CONTRACT shall not be assignable except at the written consent of the parties hereto and it shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto.

SECTION IX- SPECIAL PROVISIONS

The CONSULTANT shall comply with all applicable Federal, State, and local laws and ordinances at the time the plans are sealed, and will not discriminate against any person on the basis of race, color, or national origin in the performance of this CONTRACT, and shall comply with the terms and intent of Title VII of the Civil Rights Act of 1964, P.L. 88-354.

The CONSULTANT further agrees to insert the foregoing provisions in all sub-contracts hereunder, except sub-contracts for standard commercial supplies or raw materials. Any violation of such provisions shall constitute a material breach of this CONTRACT.

This CONTRACT shall be in full force and effect only when it has been approved by the City Council of the City of Tempe, Arizona, and when executed by the duly authorized CITY officials and the duly authorized agent of the CONSULTANT.



R·A·M·M

EXHIBIT A

RICKER • ATKINSON • McBEE • MORMAN & ASSOCIATES, INC.

Geotechnical Engineering • Construction Materials Testing

City of Tempe
Engineering Division
P.O. Box 5002
Tempe, Arizona

November 16, 2007

Attention: Jim Bond
Assistant City Engineer

Project: The Pier at Tempe Town Lake
Improvement District No. 180
Tempe, Arizona
Tempe Project 5103011

In accordance with your request, we have reviewed the construction documents for the referenced project. The purpose of this review was to develop a budget amount for inspection and materials testing during construction.

Based on our review of the drawings and in accordance with City of Tempe requirements and MAG Specifications, we estimate the testing costs to be \$60,000.00. The actual cost will depend to some degree on the contractor's schedule.

Please call if there are any questions or if you need additional information.

Respectfully submitted,

RICKER, ATKINSON, MCBEE & ASSOCIATES, INC.

Paul Klock
Project Manager

/ch

11/19/07